INTERIOR BOARD OF INDIAN APPEALS

Wind River Resources Corp. v. Western Regional Director, Bureau of Indian Affairs

43 IBIA 1 (04/06/2006)

Related Board case:
42 IBIA 72

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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WIND RIVER RESOURCES CORP., Appellant,	:	Order Dismissing Appeal Without Prejudice
v.	:	
	:	Docket No. IBIA 06-24-A
ACTING WESTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	:	April 6, 2006

Wind River Resources Corporation (Appellant) appeals from an October 21, 2005 decision of the Acting Western Regional Director, Bureau of Indian Affairs (Regional Director; BIA) concerning bonding requirements for Appellant's oil and gas operations on the Uintah and Ouray Reservation (Reservation) of the Ute Indian Tribe (Tribe). We conclude the appeal is not ripe for Board review, and therefore we dismiss it without prejudice.

Appellant has been conducting oil and gas operations on the Reservation pursuant to a personal bond secured by an irrevocable letter of credit from a bank, which is a type of bond listed in regulations governing minerals agreements for the development of Indian-owned minerals. See 25 C.F.R. §§ 225.1 (Purpose and scope), 225.30 (Bonds). On February 14, 2005, the Superintendent of the Uintah and Ouray Agency (Superintendent; Agency) notified Appellant that the Agency would no longer accept personal bonds accompanied by letters of credit for companies conducting business on the Reservation. Instead, the Superintendent identified a subset of the types of bonds listed under section 225.30 as the only types that the Agency would accept. 1/

1/ In addition to refusing to accept personal bonds accompanied by letters of credit, the Superintendent's decision also stated that the Agency would no longer accept Nationwide or Statewide Bonds, which are also listed in section 225.30. He identified the following types of bonds listed in section 225.30 as acceptable to the Agency: (1) Surety or Collective Bond from a qualified Surety approved by the Department of the Treasury; (2) Cash Bond, Cashier's Check or Certified Check; and (3) Certificate of Deposit issued by a financial institution, the deposits of which are Federally-insured.

Appellant appealed the Superintendent's decision to the Regional Director, contending that the Superintendent must accept a personal bond accompanied by an irrevocable letter of credit because it is among the types of bonds listed in section 225.30. During the course of that appeal, the Ute Indian Tribe moved to set aside the Superintendent's decision. The Tribe stated that it did not object to Appellant posting a personal bond accompanied by an irrevocable letter of credit. The Tribe asserted that "[i]t is not clear that requiring a surety or similar bond would be in the best interest of the Tribe" because "[t]he Tribe has been advised that surety and certain other forms of bonds for oil and gas operations are difficult for some companies to obtain at this time, are often expensive, and do not necessarily provide a commensurate increase in security." July 22, 2005 Ute Indian Tribe's Motion to Set Aside Acting Superintendent's Decision at 3. According to the Tribe, the "more significant issue" was whether the amount of Appellant's bond was adequate. Id.

On October 21, 2005, the Regional Director issued her decision. The Regional Director concluded that the Superintendent had the legal authority to refuse to accept certain types of bonds, such as letters of credit, even if they were of a type listed under section 225.30. The Regional Director also concluded, however, that the Superintendent's decision was not adequately explained or supported by the factual record. Therefore, her decision remanded the matter to the Superintendent "in order that he may provide substantial, on-the-record evidence as to the rationale and factual basis for the Agency's decision." Regional Director's Decision at 6. In addition, the Regional Director directed the Superintendent to address both the "best interest" and "adequacy" issues raised by the Tribe.

Appellant appealed the Regional Director's decision to the Board. On February 23, 2006, before briefs on the merits were filed, the Board suggested that this appeal might not be ripe for Board review, and ordered briefing on that issue. The Board noted that the "best interest" issue raised by the Tribe implicated what type of bond might be deemed acceptable or appropriate, as did the Regional Director's requirement that the Superintendent provide a properly supported rationale for his decision. Thus, it appeared possible that on remand, the Superintendent could conclude, based on a more fully-developed record and after considering or reconsidering all of the arguments raised by the Tribe and by Appellant, that the type of bond offered by Appellant would be in the best interest of the Tribe and would be acceptable to BIA. In that case, the Regional Director's legal conclusion that BIA has authority to refuse to accept certain types of bonds listed under section 225.30 would have no effect on Appellant, and a decision by the Board on this issue would have been merely advisory. See Wopsock v. Western Regional Director, 42 IBIA 117, 121 (2006) (Board does not issue advisory opinions).

On the other hand, if the Superintendent were again to decide on remand to refuse the type of bond offered by Appellant, he would be required to articulate the specific basis for such refusal, and not simply declare, without explanation, that the Agency no longer accepts certain types of bonds. See Feb. 14, 2005 Superintendent's Decision. In that case, an appeal could be decided with the benefit of a complete administrative record and the full range of issues could be addressed.

Appellant, the Regional Director, and the Tribe filed responses to the Board's request for briefing on ripeness. All agree that this appeal is not ripe for Board review. 2/

Although the ripeness doctrine does not impose a jurisdictional limitation on the Board, the Board has applied it in appropriate cases and follows the analysis used by the Federal courts. See, e.g., Bullcreek v. Western Regional Director, 40 IBIA 196, 202 n.5 (2005). Three considerations are relevant: will a delay cause hardship, will Board intervention interfere with further administrative action, and is further factual development of the issues required? Id.

We conclude that all three considerations weigh in favor of dismissing this appeal. First, a delay will not cause hardship. The Regional Director's decision, while upholding the Superintendent on a legal principle, remanded the portion of the Superintendent's decision that had an actual impact on Appellant — the specific decision to refuse to accept Appellant's personal bond accompanied by an irrevocable letter of credit. The remand requires the Superintendent to consider the "best interest" issue and to provide a proper rationale and factual basis for his decision, effectively requiring him to issue a new decision, even if he reaches the same conclusion. 3/ In the meantime, Appellant will be subject to no

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2/ The Regional Director also raises the issue of standing. Ripeness and standing are "closely related in that each focuses on whether the harm asserted has matured sufficiently to warrant judicial intervention." Bullcreek v. Western Regional Director, 40 IBIA 196, 203 n.6 (2005), quoting Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1234 (10th Cir. 2004). We conclude that ripeness is the more appropriate doctrine to apply in dismissing this case, and express no opinion on whether Appellant would otherwise have standing to pursue this appeal.

3/ The Regional Director only affirmed the Superintendent's decision "insofar as the general question of authority is concerned." Regional Director's Decision at 6. Although the Regional Director did not expressly require the Superintendent to issue a new decision, we construe that to be the practical effect of the Regional Director's decision, particularly in light of the requirement to address the "best interest" and "adequacy" issues raised by the Tribe.

adverse effects. Second, Board intervention at this time would interfere with implementation of the Regional Director's remand because while the appeal is pending, BIA lacks jurisdiction over the matter. See Bullcreek v. Western Regional Director, 39 IBIA 100, 101-02 (2003). As we have noted, the remand could result in a different decision on what type of bond the Superintendent will accept, which could resolve the dispute without further appeals. Third, the Regional Director concluded that the Superintendent's decision lacked an adequate explanation or factual basis, thus requiring further development of the record, even assuming the Superintendent and Regional Director are correct on the general question regarding BIA's authority.

We conclude that this appeal is not ripe for Board review, and should be dismissed without prejudice to Appellant's right to appeal any issues that may arise from subsequent decisions by the Superintendent and Regional Director concerning bonding requirements imposed on Appellant, including but not limited to the Regional Director's conclusion that BIA is not legally precluded from restricting the types of acceptable bonds to a subset of those listed in the regulations.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board dismisses this appeal without prejudice because it is not ripe for Board review.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Amy B. Sosin
Acting Administrative Judge